No. 886

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,908

LUCILLE H. BURCH,

Appellant,

v.

READING COMPANY,

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEE AND APPENDIX

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COUNTER-STATEMENT OF QUESTIONS INVOLVED.

I. Did the Court err in directing the jury to disregard certain testimony of a plaintiff's witness and certain documents introduced by plaintiff in an attempt to establish that plaintiff was injured due to defendant's negligence in requiring plaintiff, a woman, to perform work too heavy for her, where neither the testimony nor the documents supported the contention, plaintiff herself testified that she was capable of performing heavy work, the testimony established that she was actually doing light work at the time of her accident, and there was no evidence that her fall was due to the type of work then being performed by her?

II. Where the closing argument of counsel for plaintiff contained statements, designed to arouse the sympathy of the jury and unsupported by any testimony, implying that plaintiff should receive a substantial verdict to assist in supporting two small children, was it error for the Court to endeavor to counteract this appeal by charging that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families" and that no sympathy of any sort for either side should play a part in the decision?

III. Was it error to instruct the jury that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider whether defendant had sufficient notice of any allegedly unsafe condition, where only one hour had elapsed since work started at the scene?

IV. Was it error to instruct the jury that if they should find that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, that possible defense?

V. Was it error for the Court to use the words "doubt" and "convince" in the course of charging that plaintiff had the burden of proving defendant's negligence by a preponderance of the evidence?

VI. Was the charge of the Court fair?

COUNTER-STATEMENT OF FACTS.

Plaintiff brought the above-captioned action for injuries allegedly sustained by her when she fell at Scotts Lane crossing, East Falls, Philadelphia, while she was working as a track laborer, on or about November 27, 1950.

At the trial, November 15 through November 18, 1955, before Judge Van Dusen and a jury, the testimony, summarized briefly, was as follows:

Plaintiff testified that she went to work for Reading Company in 1944 as a section laborer; that with a gang of other laborers she went to Scotts Lane crossing at about 7 o'clock on the morning of November 27, 1950, to make repairs by filling in holes under the rails of defendant's tracks; that she was 5 feet 4 inches tall and weighed 180 to 185 pounds (73a) that it was her job to dig dirt out of a pile alongside the crossing and carry it to the point on the crossing where the holes were located; and that while walking from the rail to the pile of dirt, carrying an empty shovel, she fell, about 8:15 a.m. She testified that she fell upon the paved surface of the street about 3 feet south of the rail and about 2½ feet in from the edge of the street; that she was wearing galoshes, overalls and a jacket; that when she fell she could feel her feet rolling out from under her and could feel pebbles about the size of her little fingernail (25a); and that the street was worn out and covered with hundreds of pebbles all the way down from the rails (25a).

She testified that she was taken to the hospital and her ankle placed in a cast, which was replaced from time to time by other casts; she received treatment at Women's Medical College Hospital, Philadelphia General Hospital and Temple University Hospital for a period of five years; that she was advised by the Company doctors to walk without the cast, but she was unable to do so (32a); and that she cannot now walk well without the crutches or cane.

Upon cross-examination, plaintiff admitted that she was hired to do the same work as male track laborers, lifting ties, working on rails, pulling spikes out of rails, and shoveling ballast, (46a-47a) and that she was able to do that type of work continuously for six years prior to the accident (48a); that she was accustomed to working on ballast which was dumped loosely in between the ties along the track by a machine (47a); that at the crossing there were pebbles all the way from the rails to the bottom of the hill, a distance in excess of 100 feet (25a, 55a); that she saw the pebbles on the street before she fell (55a); and that she walked just as carefully as she could doing her work, but the accident happened (55a). Plaintiff further admitted that at the hearing in January 1951 held by defendant two months after the accident, she testified that she did not know what caused her to fall, she did not know the condition of the street and did not mention the existence of any pebbles (63a-71a).

Joseph E. Osborne, Field Supervisor of the Department of Streets of the City of Philadelphia, testified that he went to Scotts Lane crossing to supervise the repaving of it in April 1951, five months after the accident, (123a), and that at that time the street was full of holes, depressions and cracks, and there was a steep grade (123a-129a).

Upon cross-examination, Mr. Osborne stated that he could not testify of his own knowledge as to the condition of Scotts Lane in November of 1950, or whether it was the same as in April 1951 (129a), or whether there was any hole within 3 or 4 feet of where plaintiff fell (131a), because he only drove over it once or twice a month; that Scotts Lane was repaved in 1951 as the result of a City ordinance approved May 24, 1950, six months prior to plaintiff's fall (131a); and that it was usual for the Department of Public Works to introduce such an ordinance if it considered the repaving necessary; but that he did not know whether the particular ordinance in question was introduced at the request of property owners adjacent to the street (132a-3a).

In an effort to show that the plaintiff, at the time of her accident, was performing work which she should not have been required to do and which was imposed upon her by her immediate supervisors without the approval of the management of defendant (40a-42a), counsel for plaintiff called R. W. Morrison, Track Supervisor of Reading Company, and confronted him with a memorandum dated April 20, 1949, relating to a certain train trip to be made by defendant's Board of Directors on April 26, 1949 (1½ years prior to the accident) which contained, *inter alia*, the following sentence: "• • • also make general clean-up of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes." Mr. Morrison testified, contrary to the contention of plaintiff's counsel, that the above-described sentence was placed in the memorandum because he did not wish to be criticized by the Board of Directors who were riding upon the train, if they were to see women laborers doing light work, such as picking up papers, rather than the usual heavy work for which track laborers are customarily assigned (153a-4a); and that the Board of Directors knew that the railroad employed women laborers to do hard track labor (155a).

Plaintiff produced no testimony to show that the memorandum in question was written for the purpose of concealing from the Board of Directors the fact that women laborers were working at regular track labor, nor did plaintiff produce any testimony to show that the order contained in the memorandum bore any relation to the work being done by plaintiff on the date of her accident or in any way contributed to her accident. Plaintiff's foreman, DiLuzio, called in rebuttal by counsel for plaintiff, testified that he neither received the memorandum of April 20, 1949, nor had he discussed it with his supervisors (289a-290a). At the conclusion of the testimony, upon motion by counsel for defendant, the trial judge directed that the testimony of Mr. Morrison, the contents

of the memorandum and all other testimony relating to the subject of that memorandum be stricken and disregarded by the jurors.

Defendant produced plaintiff's foreman, DiLuzio, who testified that he came to the scene five minutes after the accident; that the street at the point where plaintiff fell was smooth and in good condition; that he saw a dirty or ashen colored heel or shoe mark where plaintiff fell; that there were only 20 or 30 scattered pebbles in the general area where she fell and only 1, 2 or 3 pebbles at the shoe mark (221a-2a).

Defendant likewise produced the testimony of Larry Chiolan, Plant Engineer of the Fred Whitaker Company, which was located adjacent to Scotts Lane Crossing. Mr. Chiolan testified that the contract for the repaving of Scotts Lane from Abbottsford Road to Ridge Avenue was let as a result of an ordinance which was introduced following negotiations between the Fred Whitaker Company and the City; that the Whitaker Company desired to have Scotts Lane widened in order to permit its large tractor-trailer trucks to enter the plant from Abbottsford Road; that he, himself, passed the crossing going to and from work at least twice every day during November of 1950 and that the condition of the road was generally good (231a-237a).

The testimony upon the issue of damages, insofar as it relates to the issues herein, will be discussed generally hereafter under the Argument section of this brief. After the charge of the Court, the jury retired and returned a verdict in favor of defendant. Plaintiff filed a motion for a new trial containing 37 allegations of error on the part of the Trial Judge in the handling of the trial. That motion was denied in an exhaustive Opinion and Order which is reported at 140 F. (2d) 136 and is set forth in Appellant's Appendix (376a-412a) and an Exhibit A thereto, set forth in Appellee's Appendix (1b). From the Order plaintiff has appealed.

ARGUMENT.

I. It was not error for the Court to direct the jury to disregard the testimony of plaintiff's witness Morrison and certain documents introduced by plaintiff in an effort to establish that defendant was negligent in compelling plaintiff to do work too heavy for her and that her fall resulted from that negligence.

It was one of the contentions of plaintiff that defendant was negligent in employing women laborers in a job which women should not have been doing (7a, 40a-42a). Counsel for plaintiff had in his possession certain memoranda addressed to plaintiff by defendant's track supervisor Morrison (plaintiff's Exhibits 8, 9 and 10) issued in 1948 and 1949, relating to certain hearings held as to the ability of women laborers, including plaintiff, to perform the duties of a track laborer. In addition, counsel for plaintiff had a copy of a memorandum dated April 20, 1949, stating as follows (146a):

> "April 20, 1949, sections 6, 7, 8, 9, 10, 11, 12, 13, and 14. There will be a road trip of Reading Company Board of Directors leaving Reading Terminal, Philadelphia, 11:00 A. M. Tuesday, April 26, and run via Norristown branch.
>
> "Returning this special will operate via Main Line and west side to 24th and Chestnut Streets, on Wednesday, April 27. Do not know exact time this train will arrive at 24th and Chestnut Streets. Arrange to keep in touch with dispatcher that day for time train will reach your section.
>
> "Also make general cleanup of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes.
>
> Signature, R. W. Morrison."

Counsel for plaintiff called Mr. Morrison as his witness, in an effort to establish that the memorandum of April 20, 1949, reflected a general policy on his part that women were to do heavy work, that Mr. Morrison's policy was contrary to the wishes of the Board of Directors, and that his orders were communicated to plaintiff (41a-2a).

Mr. Morrison, however, testified on the contrary that it was the policy of the company, known to the Board of Directors, that women track laborers were expected to perform the same kind of work as men track laborers, and that his instructions to "keep the women out of sight" were issued so that the Board of Directors would not see the women laborers doing light work such as picking up papers as described in the memorandum (146a-155a). He further testified that in the hearings referred to in plaintiff's Exhibits 9 and 10 in 1949 plaintiff stated that she felt she was able to do the work of a man (162a).

Likewise, plaintiff's foreman DiLuzio, called by plaintiff in rebuttal, testified that he never received the memorandum of April 20, 1949 from his superior. At the conclusion of the testimony the Court directed the jury to disregard Mr. Morrison's testimony and the memoranda.

Appellant now contends that the Court "ruled as a matter of law that appellant had failed to make out a case under the theory that appellee had subjected appellant to a job too hard for her to perform as a woman" (Appellant's Brief, p. 8). The Opinion and Order of the Court points out that the Court did not so rule as a matter of law and charged the jury to consider "the physical capabilities of the employee under the circumstances" in determining whether the defendant had exercised reasonable care, but merely granted defendant's motion to strike the testimony and instructed the jury to disregard it (383a and 385a, footnote 21). Appellee submits, however, that in any event the jury should not have been permitted to consider any testimony relating to this

issue and that a directed verdict in defendant's favor upon it would have been proper.

From the review of the testimony of Mr. Morrison and the memoranda described above, it is apparent that plaintiff failed to make out a cause of action upon the theory that defendant was negligent in permitting plaintiff to engage in the kind of work she was doing at the time of the accident. This is so for several reasons:

(1) Plaintiff failed to establish by the testimony of any witness that Mr. Morrison's memorandum of April 20, 1949, was written because the Company's management did not approve of the use of women as track laborers doing the same work as men. In fact, the testimony was to the opposite effect;

(2) Plaintiff failed to establish that the order contained in the memorandum was ever communicated to plaintiff or her foreman, either about the time of the accident, or at any earlier time; and

(3) Plaintiff failed to establish that there was any causal relationship between the kind of work which plaintiff was doing as a female track laborer and her fall, since plaintiff testified that she was capable of doing heavy work, and there was testimony that she was actually doing light work at the time.

Numerous authorities support the action of the learned Trial Judge in this respect.

In *Brady* v. *Southern Railway Co.*, 320 U. S. 476 (1943), the United States Supreme Court, in affirming the decision of the Supreme Court of North Carolina, holding that the case was improperly submitted to the jury, stated (at pages 479-80):

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion

of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524. Cf. *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Commissioners* v. *Clark,* 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States,* 319 U. S. 372; *Pence* v. *United States,* 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, n. 1; *Anderson* v. *Smith,* 226 U. S. 439; *Coughran* v. *Bigelow,* 164 U. S. 301, 307; *Gunning* v. *Cooley,* 281 U. S. 90, 93 note, *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 673; *Parks* v. *Ross,* 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§ 2494 *et seq.*"

Likewise, in *Chesapeake & Ohio Ry. Co.* v. *Thomas,* 198 F (2d) 783 (C. A. 4, 1952), the Court of Appeals, in holding that one of three issues should not have been submitted by the trial court to the jury, stated (at page 788):

"We are well aware of the line of cases decided by the Supreme Court on the functions of the court and the court and the jury under the Federal Employers' Liability Act and the proposition they established that an appellate court must not take cases out of the jury's hands or uphold such action where any basis whatsoever for submission is revealed by the evidence [citing authorities]. But this does not mean that such an appellate function is eliminated under the Act, or that reversal is not justified upon

'a complete lack of probative facts to support the conclusion reached.' *Lavender* v. *Kurn, supra,* 327 U. S., at page 653, 66 S. Ct. 744. To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact."

This problem has been discussed in detail in a recent Pennsylvania case, *Finnegan* v. *Monongahela Con. R.R. Co.,* 379 Pa. 63 (1954). In an opinion which analyzes all of the recent Federal cases upon the right of the court to withdraw an issue from the jury in a case arising under the Federal Employers' Liability Act, the Pennsylvania Supreme Court entered judgment for defendant *n.o.v.* The court stated (at page 72-3):

> "The conclusion is inevitable that on no theory advanced by the plaintiff is there evidential support for a finding that defendant was negligent. Moreover, even if we assume that defendant was negligent, plaintiff still cannot recover because the presence of the steel in the passageway or elsewhere was not the proximate cause of plaintiff's injury."

For the above reasons, and the reasons so ably set forth in the Opinion and Order of the Court (383a-8a) Appellee submits that the Court did not err in directing the jury to disregard the testimony of Mr. Morrison and the memoranda in question.

II. The Court did not err in the portion of its charge relating to sympathy and prejudice, given in an effort to counteract the appeal to sympathy and prejudice made in the closing of argument of counsel for plaintiff.

At the trial plaintiff testified as follows (11a-12a):

> "Q. How old are you?
> A. 55.

Q. And are you married?
A. I am a widow.
Q. Do you have any children?
A. I have two I raised. They are grown now.
Q. Two that you raised?
A. Yes.
Q. They are not your own, but you raised these two children?
A. Yes.
Q. And they are both grown, you say?
A. Yes.
Q. Are they married and off on their own?
A. One is.
Q. I see. Does the other one live with you?
A. No, sir."

In spite of this testimony, counsel for plaintiff made the following appeal to the jury in the course of his argument at the close of the testimony (303a):

"That is for five long years she would have made $60 or $62 a week, whatever it amounts to, and she would have had that $15,000 to spend on herself, and, yes, to be a human being herself, too, and to continue to do the same kind of decent thing she did before when she took two colored foundlings and raised them as her own, when she raised two little children like her own, and gave to them a mother's feeling, a mother's care.

"If she wanted to spend it on those little children, she had a right to do it. She had a right to have that $15,000 coming into her home, slowly in small amounts, save a dollar, do something that would give her pleasure; and her pleasures in her simple way were not fancy dress and fancy living, but being a mother to little children that needed it. I think that nothing bespeaks more wondrously for this fine little woman than what she actually did, because her acts speak louder than words."

And further (307a-8a):

"Please try to approach this case thinking this thought in mind: Do only what's right. Give her not one penny more than what she should get, but let her be provided for in the style to which she was living before, not higher, no higher station, a little humble apartment on North 13th Street where she lived then. That is what she needs now. She wants to be able to pay her rent, to pay her grocery bill, to buy a winter coat, to make sure the place is warm, to be able to have a few dollars left over to save for the day when she wouldn't have a job, so that when the time comes that ordinarily she would have retired, she can live on the annuity that will pay to her week by week, because I give you my word that as I have striven on her behalf out of respect for her, out of respect for her as a human being, to see to it that her case is fairly presented and her rights protected here, so I give you my solemn word that whatever this woman gets will be protected for her with some substantial life insurance company, so that she will be paid by them week by week and year by year, and if she should pass away from this world before that time, let her leave to those who are near and dear to her what any of us would leave if we had accumulations that we wanted to leave to our family or those that were dear to us. Whatever she wants to do with her money that she is justly entitled to, may she do it and do it with all our blessings."

The testimony quoted above was the only testimony relating to the existence of plaintiff's alleged foster children; it established that they were now grown up, that they did not live with plaintiff, and there was no testimony that she had contributed to their support at any time in the immediate past; nor was there any evidence that they were her rightful heirs. Despite these facts,

counsel for plaintiff made an obvious attempt to appeal to the sympathy of the jury by conveying the impression that plaintiff needed, and was entitled to a substantial sum, so that she could provide for two little children.

In its charge to the jury, the Court endeavored to counteract this misleading impression and appeal by stating as follows (325a):

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

It is of course axiomatic that Federal Trial Judges have a duty to act upon their own motion to counteract irrelevant, prejudicial remarks of counsel: *Chicago & Northwestern Ry. Co.* v. *Kelly*, 74 F. (2d) 31 (C. C. A. 8, 1934); *Hockaday* v. *Red Line, Inc.*, 174 F. (2d) 154 (C. A. D. C., 1949); *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318 (1929).

Appellant contends, however (Appellant's Brief, pages 26-28), that the Court erred in creating an inference that there were parties in the case other than the parties of record who might be affected by the verdict. Appellant cites *Knight* v. *Allegheny County*, 377 Pa. 502, 105 A. (2d) 141 (1954), and *Narcisco* v. *Mauch Chunk Township*, 369 Pa. 549, 87 A. (2d) 233 (1952), as examples of improper conduct by counsel in introducing such inferences into a case. Appellee submits that the language of those cases (quoted at length in Appellant's Brief at pages 26 and 27) is directly applicable to the conduct of counsel

for plaintiff in his summation. That summation, Appellee submits, is a classic example of the introduction by counsel into a jury's consideration, of a false inference that there are persons who are not parties to the action and who would be affected by the judgment therein, namely, the two alleged foster children of plaintiff. The argument of counsel for plaintiff was designed not only to appeal to the juror's sympathy for a widow and two "little children," but also to excite the prejudice of the jury in her favor and against the defendant corporation.

In its charge to the jury, the Court used an example which not only served to make clear that there should be no more sympathy in favor of the individual plaintiff than the corporate defendant, but also served to point out that the interest of the two unnamed "little" foster children was at least as remote from the issues of the case as was that of any widows and orphans who might be stockholders of defendant, and dependent upon it for their support. The fact that such a thought may not heretofore have been expressed in charges in cases participated in by counsel for plaintiff does not detract from the validity of that thought.

For the above reasons, as well as those aptly set forth in the Opinion and Order of the Court (393a-4a), Appellant submits that the charge of the Court above quoted contained no prejudicial error.

III. It was not error to instruct the jury that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider whether defendant had sufficient notice of an allegedly unsafe condition where only one hour had elapsed since work started at the scene.

In its charge to the jury the Court read plaintiff's point for charge No. 8 as follows (339a-40a):

> "The duty of providing a reasonably safe place to work imposes upon the employer the affirmative

duty of inspecting the place where its employees are to work and imposes a duty on the employer to search out defects or hazards which would normally be revealed thereby and the failure to make such reasonable inspection or to learn of the conditions which a reasonable inspection would reveal is negligence. If you find that the plaintiff in this case suffered her injuries, in whole or in part, because such an inspection was not made and therefore, not corrected, then your verdict must be for the plaintiff."

At another point in its charge (330a) the Court charged the jury as follows:

"Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. Di Luzio, who was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

It should be noted that plaintiff, in her requests for charge, did not request the Court to instruct the jury that the defendant had a duty of antecedent inspection, but only a duty of inspection (362a-3a). The charge of the Court was thus in conformity with plaintiff's request.

Appellant now contends, however, that the Court should further have charged that the defendant was under

a duty of antecedent inspection. Appellant asserts in her Brief (page 32):

> "A master is under a duty at all times to make an *antecedent* inspection of the place where it directs its employees to work *before* they begin working there."

Appellee submits that this is an incorrect statement of the law, and that the cases cited by Appellant in this portion of her brief do not support that statement.

It must be borne in mind that the right of action given to railroad employees under the Federal Employers' Liability Act permits the employee to recover "for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employee of the carrier." The common law principles of negligence have thus been incorporated into, rather than supplanted by, the standard of care set forth in the Federal Employers' Liability Act. Appellant's contention is, in effect, that the defendant railroad is under an absolute duty to provide an employee with a reasonably safe place to work, and that if the place proves to be unsafe, the existence of that unsafe condition is, in itself, negligence *per se*. Defendant submits that this contention is incorrect in two respects.

First, the duty imposed by law is that the employer shall exercise *reasonable care* to provide the employee with a safe place to work, not that the employer is under an absolute duty to provide a safe place to work. It is a long established principle of law that in determining whether a person has used reasonable care where an unsafe or defective condition is disclosed either upon his premises or upon premises where his employees work, it is necessary for the plaintiff to establish that the unsafe condition existed for a sufficient period of time prior to the injury so that the defendant had knowledge or notice of its existence in sufficient time to take steps to remedy the condition. The law is no different in this respect

as to railroad employers and employees than it is with rspect to other persons. See *Kaminski* v. *Chicago River and Indiana R. Co.*, 200 F. (2d) 1 (C. A. 7, 1952); *Frizzell* v. *Wabash R. Co.*, 199 F. (2d) 153 (C. A. 8, 1952); *Wetherbee* v. *E. J. and E. Ry. Co.*, 191 F. (2d) 302 (C. A. 7, 1951); *Beattie* v. *E. J. and E. Ry. Co.*, 217 F. (2d) 863 (C. A. 7, 1954); *Finnegan* v. *Monongahela Connecting R. Co.*, 379 Pa. 63, 108 A. (2d) 321 (1954).

In the *Kaminski* case, plaintiff, a conductor, sued his employer for injuries received when he fell through a hole into an empty coal pit on the premises of an industrial concern while walking along the concern's tracks for the purpose of checking car numbers. After a verdict for plaintiff, defendant's motion for judgment *n.o.v.* was denied; thereafter the appellate court reversed the judgment of the District Court and directed that judgment be entered for defendant. The court stated (page 3):

> "In the instant case, the defendant did not own, maintain, or control the premises upon which the accident occurred. The track inside the building or alongside which the plaintiff fell was owned and maintained by the industry. The defendant's sole duty to plaintiff was to exercise reasonable care to furnish him with a reasonably safe place to work. It was not an insurer of plaintiff's safety. The mere fact, therefore, that plaintiff sustained an injury does not render defendant liable."

and again (at page 4):

> "*Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence.* The record in this case clearly establishes that such circumstances did not

exist here. The only inference that can reasonably be drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. *It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition.*" (Emphasis added.)

Likewise in the *Friezell* case, plaintiff, a section foreman, brought an action against his railroad employer for injuries sustained while moving a push car from his employer's tracks. A directed verdict and judgment in defendant's favor were affirmed on appeal. The court stated (at page 157):

> "Plaintiff's second assignment of negligence, that defendant was negligent in furnishing him an unsafe place in which to work because the footing was insecure, causing him to slip in the act of assisting in placing the push car back on the rails, must assume as a predicate and premise that it was the duty of defendant, in the exercise of reasonable care, to keep the cinder ballasting on each side of the tracks and adjacent to the ends of the ties, smooth and even at all times and places, including the period of time when the ties were being removed and replaced. The test of negligence, as so well established and heretofore referred to at some length, is whether a reasonably prudent person, under the circumstances, would have done so. Applying the legal principle to the facts in this case—can it be said that defendant should have anticipated the necessity for plaintiff to be lifting a push car back on the rails at any and all points along its line, in view of the facts heretofore noted, and particularly the fact that this was not the main line and only one or two trains passed over it during the working hours? Can it be logically said that a reasonably careful and prudent person would assume that the normal indentations in cinder ballasting caused

by normal rainfall would furnish a hazard to section hands accustomed, as they had to be, to walking along and over such ballasting? The rule of law is well established that the standard of care must be commensurate to the dangers of the business.

"* * * The rule, of course, works both ways. Less diligence will be required to constitute reasonable care where the danger is slight than would be required where the danger is great. We fail to find any reasonable grounds for the inference that the defendant was negligent merely because slight unevenness in the surface of the cinder ballasting was permitted to exist at such places as the location of plaintiff's injury.

"We find no error in the conclusion of the trial court upon which the judgment was based. The judgment should be and is affirmed."

None of the cases cited in Appellant's Brief (pages 32 to 38) in any way negative this proposition. Even the case most heavily relied upon by plaintiff, *Williams* v. *Atlantic Coast Line R. Co.*, 190 F. (2d) 744 (C. A. 5, 1951), does not hold to the contrary. In that case an employee was ordered by his railroad employer to go to the scene of a washout along the railroad's tracks to make emergency repairs, in the course of doing which it was necessary for him to wade in deep water, as a result of which he drowned. While the Court said: "* * * the employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees," this language must be read in the context of the fact situation presented in that case. It is apparent that the employee was asked to engage in work at a location where the danger was obvious, and thus the employer could be said to have been put on notice by the mere existence of the obviously hazardous condition.

On the other hand, where the condition is not obvious to the employer prior to the time the employee commences work, it becomes a jury question as to whether the employer used reasonable care to detect the condition prior to the injury. In this connection, such factors as the length of time the condition had existed, the location of the condition, the fact that employees did or did not regularly work at that location, the opportunity available to the employer to discover condition, and many other factors are to be taken into account. This was the situation in the *Kaminski* and *Frizzell* cases as well as the instant case. The Court properly so instructed the jury.

The second respect in which Appellant's contention is erroneous is that it implies that the failure of the employer to make an antecedent inspection constitutes negligence *per se*, and not merely evidence from which the jury may conclude that the defendant failed to use reasonable care. No case cited by Appellant, nor any other case found by Appellee, so holds. If, as Appellee submits, the failure of the employer to use reasonable care to provide the employee with a safe place to work is the test upon which the jury is to predicate liability, an instruction by the Court that the employer's duty of antecedent inspection is absolute and his failure to do so is negligence would remove that issue from the jury's determination by making it negligence as a matter of law. Appellee submits that there is no authority in support of such a proposition and that such an instruction would have been improper.

For the above reasons, as well as those stated in the Opinion and Order of the Court (399a-402a) Appellee submits that the Court did not err in charging the jury that in considering whether the defendant used reasonable care to remedy an allegedly unsafe condition, the jury should consider the fact that only an hour elapsed between the time work started at the location and the time of the accident.

IV. It was not error to instruct the jury that if they found that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, that possible defense.

Appellant in her brief (pages 39-40) contends that the Court erred in charging the jury that they might consider the possibility that plaintiff's injury was the result of an accidental slip for which neither the plaintiff nor the defendant was responsible. Plaintiff asserts (page 39):

> "People do not fall for no reason at all. They either fall because of negligence of another, negligence of their own, the combined negligence of both, or a physical or a mental disability. Only where there is an act of God can it be said to have been an nonculpable accident to which the law attributes no fault to any one."

Appellee submits that this argument is clearly fallacious.

From the evidence adduced at the trial it became apparent that no one other than plaintiff witnessed her fall or knew how it occurred. Plaintiff admitted that at a hearing held two months after the accident she was asked what caused her to fall and she stated "I don't know." She was likewise asked at the hearing whether the condition of the crossing at the point where she fell was smooth or was irregular and her answer was "I don't know" (62a-68a). Plaintiff testified at the trial, however, that her feet rolled out from under her and her heel pushed through pebbles on the surface of the road leaving a mark (24a-5a), and that there were hundreds of pebbles all over the surface (25a). Defendant's foreman, Di Luzio, testified, on the other hand, that when he examined the scene immediately after the accident there was a heel mark five

or six inches long, twenty or thirty pebbles in the general area of the accident, and only one, two or three pebbles in the immediate vicinity of the mark (221a-2a).

It was defendant's theory of the case that plaintiff's injury was not caused by any negligence on defendant's part, but was caused either by the negligence of plaintiff herself, or by an unavoidable accident for which neither party could be held responsible. That defense was set forth in its Answer to plaintiff's Complaint by its denial of the allocation of negligence set forth in paragraph 6 of plaintiff's Complaint; in the opening argument of defendant's counsel wherein he stated:

> "We will show you that *if it was anybody's fault* it was Mrs. Burch's fault. * * *" (Appellee's Appendix 1b) (Emphasis added);

and in the closing argument of defendant's counsel, wherein he stated:

> "* * * The real issue you will have to decide in this case is whether or not the company was negligent in any way or *whether or not this was just an accident which was nobody's fault,* or whether it was an accident which was Mrs. Burch's own fault * * *" (316a). (Emphasis added.)

And further:

> "Nobody really has decided here, at least there is no evidence which would indicate one way or the other, whether, in fact, Mrs. Burch slipped on pebbles or whether she, just like any other heavy person might do, turned her ankle and fell and broke it. It happens all the time, as you all know. We think that there is no evidence one way or the other as to what caused Mrs. Burch to fall, and that the thing that she testified to back two months after the accident was correct, that she didn't know what made her fall, and

the chances are that she turned her ankle and fell" (313a).

Appellee submits that the evidence that Mrs. Burch was a short and very heavy person (180-185 pounds), that immediately after the accident she did not know what caused her to fall, and that examination of the scene immediately after the accident disclosed no appreciable number of pebbles in vicinity of her fall, gave rise to ample evidence in support of defendant's theory that she either slipped on one or two pebbles, for which defendant could not reasonably be held responsible, or that she merely turned her ankle and fell, which would be considered an unavoidable accident.

Where the evidence gives rise to a possibility that plaintiff's injury is the result of an unavoidable accident, the Court may properly charge the jury to consider such a possibility: *El Paso Electric Company* v. *Surrency*, 169 F. (2d) 444, 447 (C. A. 10, 1948), in which the Court stated as follows:

> "It may be that defendant's employee deliberately attempted to pass this truck by going into the southbound lane of traffic and thus drove directly into the path of plaintiff's on-coming car. On the other hand, their pick-up might have been forced across the road by a violent blow-out and under such conditions as made it impossible for them to control it. There is no direct evidence to this effect and the question of whether under all the evidence the accident was unavoidable or was due to the negligence of the defendant and its agents was properly submitted to the jury."

Likewise, in *Weschler* v. *Buffalo & Lake Erie Traction Co.*, 293 Pa. 472, 143 Atl. 119 (1928), the Supreme Court, in granting a new trial, held that it was error for the Court below to charge the jury that it was the duty

of the motorman "to have his car under such control that he could stop and avoid an accident." The Court stated that such a charge placed too great a burden on the carrier and imposed upon it the liability of an insurer; that no accident could happen under such instruction that would not carry with it an obligation to pay damages; and that "an accident may be one for which neither party was responsible."

In *Springfield Township* v. *Indemnity Insurance Co.*, 361 Pa. 461, 64 A. (2d) 761 (1949), the Pennsylvania Supreme Court was asked to hold that an insurance policy protecting the insured against "property damage accidentally suffered" required the insurance company to defend trespass actions which alleged negligence. The Court, in rejecting this contention, stated (at page 463):

> "With this contention we cannot agree. It assumes, erroneously, that the terms 'negligence' and 'accident' are synonymous. Such, however, is not the case. 'If accident and negligence be not opposites, we cannot regard them as identical, without confounding cause and effect. Accident, and its synonyms casualty and misfortune, may proceed or result from negligence, or other cause known, or unknown': *McCarty* v. *N. Y. & Erie Ry.*, 30 Pa. 247, 251. As stated in *Lacey* v. *Washburn & Williams Co.*, 309 Pa. 574, 578, 164 A. 724, 'That which distinguishes an accident from other events is the element of being unforeseen; an accident is an occurrence which proceeds from an unknown cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen.' See also *North American Life and Accident Ins. Co.* v. *Burroughs*, 69 Pa. 43, 51."

The cases cited by Appellant in her brief relate to situations where from the evidence adduced at the trial there was no possibility that the plaintiff's injury could have resulted from an unavoidable accident; such cases

are therefore not applicable to the situation presented in the instant case.

Appellee therefore submits that for the above reasons, as well as those set forth in the Opinion and Order of the Court (402a-3a) it was not error for the Court to charge the jury concerning the right to consider the possibility of unavoidable accident.

V. It was not error for the Court to use the words "doubt" and "convince" in the course of charging that plaintiff had the burden of proving defendant's negligence by a preponderance of the evidence.

The Court charged the jury as follows (329a):

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant."

And further (333a):

> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a

failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evidence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff."

Appellant has extracted certain portions of those charges, has emphasized the words "doubt" and "conviction" and argues in her Brief (pp. 42-45) that by the use of those words "* * * the Court told the jury that the plaintiff must prove her case by evidence which leaves it with a 'conviction' free of 'doubt' which to the average individual means absolute proof positive or proof greater than 'beyond a reasonable doubt.'"

Appellee submits that a fair-minded reading of the above quoted portions of the charge gives rise to no such interpretation. Nothing in the charge contained any reference to the plaintiff's being obliged to prove her case "beyond a reasonable doubt". The Court repeatedly used the phrase "by a preponderance of the evidence," not merely in other portions of the charge but in the specific portions in which the words "doubt" and "convince" were used.

Appellee submits that the effect of the Court's charge was to instruct the jury that there must be more than a scintilla of evidence raising a question in the juror's mind as to whether the defendant might have been negligent, before it could bring in a verdict for plaintiff upon the issue of negligence. As indicated by the Court in its

Opinion and Order (395a-397a), the use of the words is consistent with the language of the United States Supreme Court in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941) at page 112, where the Court stated:

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

Appellee therefore submits that for the above reasons there is no validity to plaintiff's contention that the use of the words "doubt" and "convince" in the context employed by the Judge's charge, constituted error.

VI. The plaintiff received a fair trial.

Appellant in her Brief (45-53) sets forth 25 respects in which she contends that the Court's charge was unduly favorable toward defendant and unfavorable toward plaintiff. For convenience, those 25 items will be analyzed hereafter *seriatim*.

> (1) *Contention:* "That the jury should consider the fact that the plaintiff had been doing this same kind of work ever since she had been working for the defendant as indicative that this was a safe place to work; clearly error *Margevich* v. *Chicago & N. W. Ry. Co.*, 110 N. E. 2d 914 (Ill. 1951), cert. den. 348 U. S. 861, 75 S. Ct. 84 (1954); that the plaintiff had been working on ballast where the stones are larger than the pebbles here involved and, therefore, the jury could find that the place was safe. These arguments encouraged assumption of risk as a defense. The court ignored the fact that the ballast was tamped down tight by a machine whereas the pebbles were loose and would more easily cause one to roll and fall than ballast."

Answer: The Court did not so charge. The Court stated (330-331a):

> "You also may consider the fact that plaintiff, as a worker on the tracks, was used to walking on ballast between and around the tracks. You remember what ballast is, those stones between the tracks in the pictures you see there. You can consider that she was hired to walk on stones of that sort and had done so for a number of years."

The above quoted language was incorporated in the portion of the charge relating to the issue as to whether defendant used reasonable care to provide plaintiff with a safe place to work. Appellee submits that the character of the terrain on which plaintiff was accustomed to work was a factor which the jury could and should properly take into consideration in determining whether defendant should have taken steps to remove pebbles from a street on which plaintiff was walking.

The statement in Appellant's brief that the ballast was tamped down tight by a machine is unsupported by any testimony. On the contrary, plaintiff testified (47a) that the ballast consists of large stones dumped in loose form between the ties.

> (2) *Contention:* "Assuming that the place was unsafe, inasmuch as the plaintiff had only been working at the place for an hour, the jury should take that fact into consideration in determining whether the defendant was negligent."

Answer: The correctness of the instruction in this respect has been fully discussed above under part III of this Argument.

> (3) *Contention:* "That a witness for the defendant said that the accident happened on the level ignoring the fact that the plaintiff said that it happened on a slope."

Answer: The statement is not correct. The Court charged the jury as follows (331a):

> "Now she says there were lots of pebbles, hundreds of pebbles, all over the road at this location and *that it was a steep place.*" (Emphasis added.)

It should be noted that plaintiff herself was not specific. In her testimony (20-21a) she stated that Scott's Lane was generally on a steep hill but the photographs indicated that the place where the tracks crossed the road was level and plaintiff herself did not testify that at the point where she fell it was a steep hill. Thus the Court was more generous to plaintiff in its charge than the testimony required.

(4) *Contention:* "That a witness from the Whitaker Company said that the road was in good condition, at the same time arguing that the city highway inspector and [*sic*] admitted that he did not know the condition of the road, whereas in fact that he had testified he was fully familiar with it, had studied it in order to recommend that the road be repaired, and that the road had been in bad condition for at least six months before the date of the accident."

Answer: This is an incorrect characterization of the charge of the Court, the pertinent portion of which is set forth at pages 331a-333a, which in turn is an accurate representation of the testimony of plaintiff's witness Osborne (121a-138a) and defendant's witness Chiolan (231a-241a and 247a-251a). Appellee submits that the Opinion and Order of the Court (406a-408a) completely rebuts this contention of the plaintiff.

(5) *Contention:* "That the jury should remember plaintiff was hired to walk on ballast and hence should not complain about pebbles. Untrue, and if true, was only an assumption of risk argument."

Answer: This is an inaccurate statement of the charge which is correctly quoted in Appellee's answer to Appellant's contention No. 1, *supra.* It should also be pointed out that the portion of the charge bore no relation to any doctrine of assumption of risk, but only related the issue of whether defendant used reasonable care to provide a safe place for plaintiff to work on a city street where there were allegedly pebbles, where plaintiff was an employee accustomed to working upon large loose ballast.

(6) *Contention:* "That in deciding whether or not the place was dangerous, the jury should consider the fact that the plaintiff was not carrying dynamite though there was no evidence of any dynamite in the case. This suggested that only a frightfully dangerous condition could be considered an unsafe place. There was no evidence of dynamite in the case."

Answer: This is an inaccurate characterization of the charge.

The charge was as follows (330a):

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise. If a railroad employee is engaged in carrying dynamite, clearly the degree of care imposed on the railroad to give him or her a smooth passageway is higher than when he or she is carrying a light load of dirt. You will remember the uncontradicted testimony of the foreman that he told her to do light work and that she was carrying light loads. At least, that is my memory, and if my memory does not agree with yours, again, that is for you to determine."

At the request for counsel for plaintiff, and in order to avoid any possible misunderstanding, the Court further charged the jury (354a):

> "When I was referring to dynamite, of course, that was purely an example. It had nothing whatsoever to do with this case. I was just trying to illustrate the principle that the greater the danger of a particular work, the greater the burden is on the railroad. It varies according to the circumstances, of course. You can understand that, and I was just using that as an illustration. It has nothing whatsoever to do with this case."

Appellee submits that, taken separately or together, the two above quoted portions of the charge contain no inference such as that stated in Appellant's Contention No. 6. See also Opinion and Order (401a-2a).

> (7) *Contention:* "The Court suggested that this accident could have been purely an accidental slip for which there would be no fault whereas no one had pleaded or made that argument and there was no evidence to support it."

Answer: The statement is without foundation. The defense of unavoidable accident was sufficiently pleaded in paragraph 6 of defendant's Answer. There is no requirement in the rules that nonliability by reason of pure accident must be pleaded affirmatively: See Federal Rules of Civil Procedure, Rule 8(b) and (c). The defense was asserted in the opening and closing arguments of counsel for defendant and was supported by testimony. This contention is answered fully *supra* in part IV of this Argument.

> (8) *Contention:* "In determining whether the place was a safe place to work the Court said that "all" that the defendant had to do (re: reasonable place to work) thereby suggesting that the duty to

provide a safe place to work was a very minimal thing indeed."

Answer: The charge was as follows (333a):

"The railroad may not defend on the ground that the plaintiff assumed the risk of working at this location which it prescribed. On the other hand, the railroad is not the insurer of the safety of all its employees. It does not guarantee their safety. All it is required to do under all the circumstances is to provide a reasonably safe place for its employees to work."

It is apparent from a reading of this portion of the charge that the Learned Trial Judge was merely distinguishing the duty to provide a reasonably safe place to work from the duty to absolutely insure the safety of defendant's employees. Appellee submits that the above quoted paragraph was neither intended to, nor had the affect of, minimizing defendant's duty of care.

(9) *Contention:* "The comment by the Court in reference to no sympathy for widows and orphans of stockholders of the railroad company who need the dividends to support themselves created unknown parties opposed for plaintiff to combat thereby creating mythical parties to the case whose interests were to be considered by the jury."

Answer: This contention has been fully discussed *supra* under Part II of this Argument.

(10) *Contention:* "The Court repeated that the burden of proof was on the plaintiff many, many times and used such words as 'conviction', 'convince' and that 'there must be no doubt' and repeatedly stated these things in such manner as to almost frighten the jury away from finding that the plaintiff had met the burden of proof."

Answer: The use of the words "conviction" and "convince" has been fully discussed *supra* under Part V of this Argument. Nowhere in the Court's charge as to burden of proof is found the phrase "there must be no doubt." The fact that the plaintiff's burden of proof was reiterated by the Court in its charge is not error, as was pointed out in *Palmer* v. *Miller,* 145 F. (2d) 926 (C. A. 8, 1944) in which it was contended that it was error for a trial judge to reiterate that the burden of proof was upon the plaintiff. The Court stated (at page 931):

> "* * * the burden of proof was upon the plaintiff, and we know of no Federal rule which limits the number of times that that truth, or any other truth, may be restated by a Federal Judge in a charge which on the whole is accurate and fair."

See also the Opinion and Order of the Court (409a).

(11) *Contention:* "Counsel for plaintiff argued that the failure of the defendant to call its employees created an inference that they would have been unfavorable to the defendant if called. The Court charged that the plaintiff could have called them as well. This was a statement contrary to existing law. *Chesapeake & O. Ry. Co.* v. *Richardson,* 116 F. 2d 860 (C. C. A. 6, 1941); *United States* v. *Di Re,* 332 U. S. 581, 68 S. Ct. 222 (1948); and *Haas* v. *Kasnot,* 371 Pa. 580, 92 A. 2d 171 (1952)."

Answer: The employee witnesses of defendant who were present in the Courtroom were brought there by Counsel for defendant at the request of Counsel for plaintiff to avoid the necessity for their being subpoenaed by him. There was no evidence that they knew of any facts relating to how the plaintiff fell, since plaintiff admitted that they were on the other side of the road and did not see her fall. There was no evidence that their testimony would have been favorable to defendant or

unfavorable to plaintiff. They were equally available to counsel for plaintiff, who knew of their presence in the Courtroom (14a-15a) and took advantage of their presence by calling upon them to rise and calling attention to their presence in the minds of the jury. Appellee submits that under the circumstances the argument of counsel for plaintiff was improper and the charge of the Court was proper. See also Opinion and Order (403a-406a), and discussion under (22) *infra.*

(12) *Contention:* "The Court gave sanction to the inference that the officials of the City of Philadelphia had wilfully conspired to build a new highway for the benefit of Whitaker Company, one of the property owners along the street to serve its purposes and advantages only, inferring misconduct by the City Council and the Highway Department which is supposed to build highways for the benefit of the entire public and to repair them only when needed and not merely as an accommodation for a single property owner in the area."

Answer: This contention is merely a summary of the argument made by counsel for Appellant to the jury (317a) concerning the testimony of Mr. Chiolan that the street was widened as a result, at least in part, of the request of the Fred Whitaker Company in order to accommodate its large trucks. The charge of the Court (331a-333a) took no position on this point. Appellant's contention here is really that the Court failed to adopt and reiterate the argument of Counsel for the Appellant to the jury.

(13) *Contention:* "The Court analyzed a statement taken by the defendant of the plaintiff in such light that it completely destroyed her explanation of it. In her statement she had said that she did not think she had slipped or tripped. In Court she said that she thought she rather rolled. The Court did

not mention the fact that the foreman himself admitted that there were pebbles and that he did see the skidmark of her shoe on the road supporting her contention that she had rolled on these pebbles."

Answer: The charge (331a) contained a correct characterization of the testimony relating to plaintiff's statement given after the accident (66a-9a and 6b). The Court charged, not once but twice (331a and 340a) that the foreman admitted that there were pebbles.

(14) *Contention:* "When counsel for the defendant told the jury that the railroad owed no duty to provide a reasonably safe place to work where the plaintiff fell because it was on a city street, to which she had been taken to perform her duties, counsel for plaintiff objected, the Court told the jury that the fact that it was on a public street did not *'necessarily'* excuse the defendant suggesting that it might. This was error. *Terminal R. Ass'n. of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C. C. A. 8, 1948)."

Answer: Counsel for defendant made no such statement. (See 399a, footnote 53.) Nor did the Court instruct the jury as stated in this contention (see 10a). Appellant submits that the Court's instruction was proper and consistent with the established law, namely, that the location of the accident is a factor to be considered in determining whether the defendant has used reasonable care to provide plaintiff with a safe place to work. This principle is discussed fully *supra* under Part III of this Argument.

(15) *Contention:* "The Court refused to charge plaintiff's point number 3 which was a quote right out of *Terminal R. Ass'n. of St. Louis* v. *Howell,* 165 F. 2d 135, 138 (C. C. A. 8, 1948), which in turn took it from *Blair* v. *Baltimore & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545 (1945), which went right to the heart of the question of whether this was a reasonably safe place to work (361a)."

Answer: As is pointed out in the Opinion and Order (391a-2a) counsel for plaintiff submitted to the Court 26 long and complex points for charge (361a-370a) fifteen minutes prior to the time when the Court was to charge the jury. In view of counsel for plaintiff's non-compliance with Rule 51 of the Federal Rules of Civil Procedure, the Court's refusal to read all of plaintiff's points for charge would not have been reversible error: *Paul* v. *Duluth, Missabe and Iron Range Ry. Co.*, 96 F. Supp. 578, 580 (D. Minn., 1950). In any event, however, the railroad's duty of care under the circumstances was adequately covered by the charge and therefore there was no error in failing to read any particular requests: *Dubrock* v. *Interstate Motor Freight System*, 143 F. (2d) 304, 306 (C. A. 3, 1944), cert. den. 323 U. S. 765 (1944).

(16) *Contention:* "The Court refused to charge plaintiff's point number 5 (362a) which is a restatement of the case of *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943), and went to the core of this case and corrected the improper statement by the Court in point (14) just above."

Answer: Plaintiff's point number 5 should not have been charged, since it was not applicable to the facts of the instant case. No attempt was made to argue that the railroad's responsibility had been delegated to some other person; the issue was whether the defendant had used reasonable care in providing plaintiff with a safe place to work where she fell on a city street. The Court charged plaintiff's point number 6 (338a) which was applicable.

(17) *Contention:* "The plaintiff submitted points number 9, 10, 11 and 12 (363a-364a) which were absolutely accurate under the law. The Court refused to charge those, and did not cover their subject matter in his charge. They sought to overcome the prejudicial and erroneous charge of the Court as to the duty of the defendant in the premises."

Answer: Plaintiff's point numbers 9, 10 and 12 were adequately covered in the charge. Plaintiff's point number 11 was an incorrect statement of the law, since it stated, in effect, that the existence of an unsafe place to work constitutes negligence *per se*. See discussion *supra* under Part III of this Argument.

(18) *Contention:* "Plaintiff submitted point number 20 on proper inferences to be drawn by the jury in the absence of exact proof of how the accident happened, in full reliance on *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). The Court refused to do so in this case where plaintiff's proof relied almost exclusively on inferences. Coupled with the severe charge as to plaintiff's burden of proof here, the failure to read this point was fatal (367a)."

Answer: Plaintiff's point number 20 went beyond the subject of inferences and was designed to exclude the possibility that plaintiff's injury was the result of unavoidable accident, a possibility supported by the evidence. See discussion *supra* under Part IV of this Argument.

(19) *Contention:* "Having in the body of its charge repeatedly discussed the burden of proof, the Court nonetheless read all of the defendant's points on burden of proof all over again and then read defendant's point number 3 which we believe is clearly erroneous which reads:

'• • • Thus, even if you find that the place where the *plaintiff fell is an unsafe place to work*, that fact by itself would not entitle the plaintiff to recover against the defendant in this case. • • • Before the plaintiff can recover from the defendant, *you must further find the defendant failed to use reasonable care.*'

The two phrases are incompatible and destroy each other."

Answer: This portion of the charge is not only supported by *Anderson* v. *E. J. and E. Ry. Co.*, 227 F. (2d) 91 (C. A. 7, 1955), as admitted in Appellant's Brief (page 51) but also by the authorities discussed more fully *supra* under Part III of this argument.

(20) *Contention:* "The Court stated as a positive fact that the plaintiff intentionally failed to put her weight on her foot thereby producing her continued disability despite the fact that the hospital records were replete with instructions to the plaintiff to wear appliances."

Answer: The testimony was uncontradicted to the effect that plaintiff intentionally failed to put her weight on her foot. See the testimony of plaintiff (32a), Doctor Farrell (88a), Doctor Bonner (97a), Doctor Albert (260a) and Doctor Jones (275a).

(21) *Contention:* "The misstatement that Dr. Walcott at the hospital to which the plaintiff was first taken, had agreed with the defendant's doctors that an open reduction did not have to be done and that plaintiff was healed. To the contrary he insisted that it was a necessary operation and that absent such work the exact disability that did follow would follow."

Answer: The Court did not so charge (334a-5a). The Court's charge was consistent with the testimony, which established that while Doctor Wolcott had first wanted to perform an operation, because the X-ray reports to which he referred indicated that there were presence of an only partially healed fracture, defendant's doctors objected because their examinations and X-rays indicated that the fracture was well healed; thereafter Doctor Wolcott's superior at Women's Medical College Hospital, Doctor Vastine, discovered a typographical error in the report referred to by Doctor Wolcott and concluded that the

fracture was in fact well healed and the patient was able to return to work (188a-9a). Thereafter Doctor Wolcott took a new X-ray and reported that he could still see the fracture line and was of the opinion that it was not entirely healed but that he would not perform an open reduction (189a).

If there was any discrepancy between the Court's charge and the testimony, it is immaterial because the Court carefully charged the jury that its recollection of the facts were controlling (334a-5a). It has been repeatedly held that it is not reversible error for a trial judge, in his charge, to comment upon a particular item of testimony, even incorrectly, so long as the judge leaves the decision as to the weight and affect of the testimony to the jury: see *Graham* v. *United States,* 231 U. S. 474 (1913); *Lever Brothers Co.* v. *Atlas Assurance Co., Ltd., et al.,* 131 F. (2d) 770 (C. A. 7, 1942); *Zurich* v. *Wehr,* 163 F. (2d) 791 (C. A. 3, 1947).

(22) *Contention:* "Whereas the Court refused to charge that the failure of the defendant to call its employees should create an unfavorable inference against the defendant, the Court did charge that the jury could draw an unfavorable inference against the plaintiff from her failure to call Dr. Wolcott and Dr. Lochman, who were merely doctors at public institutions to which she had been fortuitously taken for care. The opposing inference is proper under the law. Here, these doctors were equally available to both. See *Cafasso* v. *Pennsylvania R. Co.,* 169 F. 2d 451 (C. C. A. 3, 1948)."

Answer: In a number of cases, *e.g., Haas* v. *Kasnot,* 371 Pa. 580, 92 A (2d) 171 (1952); *Chicago and Northwestern R. R.* v. *Kelley,* 84 F. (2d) 569 (C. A. 8, 1936); *William Goldman Theatres Inc.* v. *Loew's Inc.,* 150 F. (2d) 738 (C. A. 3, 1945); and *Stoumen* v. *Commissioner of Internal Revenue,* 208 F. (2d) 903 (C. A. 3, 1953), it has

been held proper for a Court to permit an inference from the failure of a party to call a certain witness. It should be noted that in all of the above cases, the witness (*a*) had special knowledge of the circumstances surrounding the transaction in question, (*b*) had knowledge which the party who failed to call him contended would be favorable to that party's cause and (*c*) was absent from the trial. None of those conditions existed with respect to defendant's employees in the instant case (see Answer to Appellant's contention 11, *supra*); however, all of these conditions existed with respect to plaintiff's attending physicians. For that reason, an inference could properly have been drawn that plaintiff's failure to call those physicians was because their testimony would have been unfavorable to plaintiff. However, the Court did not so charge (335a):

> (23) *Contention:* "The charge that people who are injured are required to suffer pain in order to try to get themselves better created the impression that the plaintiff was malingering or at least refusing to suffer."

Answer: The Court did not so charge. The Court stated (337a):

> "* * * If you find the defendant negligent, you must give her something for pain and suffering because she did have very real pain, very real suffering, very real inconvenience during this period, and it is admitted by everybody that this business of putting weight on a broken ankle is painful, it hurts to get it well. On the other hand, a person has a duty to get it well, has a duty to try to cooperate and reduce the amount of damage."

Thus, the Court did not charge that a person owes a duty to suffer pain, but only that an injured person owes a duty to take reasonable steps to rehabilitate himself. Of course, the fact that the rehabilitation process may be

painful is a factor to be considered in determining the reasonableness of his conduct. This was made clear to the jury.

(24) *Contention:* "Repeatedly the Court charged over and over again that the mere fact that it was discussing damages should not lead the jury to believe that there should be an award for the plaintiff."

Answer: The statement was made twice, once in the body of the charge (333a) and once by reading defendant's point No. 10 (345a). As stated in *Palmer* v. *Miller,* 145 F. (2d) 926 (C. A. 8, 1944) at 931:

"* * * we know of no federal rule which limits the number of times that * * * any * * * truth, may be restated by a Federal Judge in a charge which on the hold is accurate and fair."

(25) *Contention:* "The Court told the jury that the plaintiff was guilty of contributory negligence as a matter of law in not putting her weight on her foot."

Answer: The Court did not so charge. The pertinent portion of the charge is quoted *supra* under Answer to Appellant's Contention 23.

CONCLUSION.

A reading of the record in this case will demonstrate, Appellee submits, that this was a case almost devoid of anything which might be considered evidence of liability on defendant's part. The contention that plaintiff was injured due to exhaustion by being made to do heavy work was totally unsupported by any evidence. Plaintiff was able to take her case to the jury only by an assertion (made five years after her accident and contradicted by

her statement made two months after the accident and by ample testimony of other witnesses) that she fell because of pebbles on a street where she was walking. That the jury would either disbelieve her or would find that her railroad employer had used reasonable care for her safety under the circumstances, was not unlikely.

The jury's verdict in defendant's favor was amply supported by the evidence. Plaintiff, quite understandably, would like a new trial by a different jury. Despite the vigorous (and often inaccurate) assertions in Appellant's brief, however, the fault lies not in the charge of the Court but in the weakness of plaintiff's case.

The charge of the Court presented the facts fairly and left the issues to the jury to determine. The portions of the charge, taken out of context or inaccurately characterized in Appellant's brief, do not even then disclose prejudicial error. The charge must, however, be read as a whole: *McLeod* v. *Union Barge Line Co.*, 95 F. Supp. 366, 369 (W. D. Pa., 1951) *aff'd* 189 F. (2d) 610 (C. A. 3, 1951). Appellee submits that a reading of the charge in its entirety, and in the light of the testimony, will clearly indicate that the charge was free of error and that, if anything, plaintiff's case was given better treatment than it deserved.

For the above reasons, as well as those set forth in the Opinion and Order of the Trial Court, and Exhibit A thereto, defendant suggests that there is no merit in Appellant's motion for a new trial, and asks that the judgment of the Court below denying that motion be affirmed.

Respectfully submitted,

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Of Counsel.

APPELLEE'S APPENDIX.

I. PORTION OF THE RECORD OF THE OPENING SPEECH OF COUNSEL FOR APPELLEE.

"So we say that we will show you that this accident did not happen through any fault of the Railroad Company, and, therefore, that the Railroad Company should not be held liable to Mrs. Burch. We will show you that if it was anybody's fault, it was Mrs. Burch's fault, and, therefore, that this is a case of what the law calls contributory negligence."

II. EXHIBIT A TO OPINION AND ORDER.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action. (Filed 3/19/56)
No. 13654.

Lucille H. Burch,
v.
Reading Company.

EXHIBIT A TO OPINION OF MARCH 16, 1956.

I. CONTENTION THAT CHARGE ERRONEOUSLY STATED THAT PLAINTIFF DID NOT PUT WEIGHT ON HER FOOT AND WAS UNREASONABLE IN NOT DOING SO (PARAGRAPH: 29, 33 & 34 OF MOTION FOR NEW TRIAL).

The record makes clear that from time to time during the time since plaintiff's fall on November 27, 1950, she used casts, braces, crutches, and restrictive bandages, thereby taking weight off her foot. At certain times her failure to place weight on her foot was recommended by doctors, but at other times this was contrary to the advice

of certain doctors (see testimony referred to at page 5 of the opinion). Plaintiff did not testify that she followed the doctors' advice in putting more and more weight on her foot, but that she tried it and could not do it because "it was hurting."[1] The charge did not say at any point that plaintiff did not have good cause to refuse to put weight on her foot or that she was unreasonable in not putting weight on her foot. This decision was left to the jury under language based on the Restatement of Torts, § 918(1) and Comment (e).[2] Cf. *Murphy* v. *American Barge Line Co.*, 169 F. 2d 61, 64 (3rd Cir. 1948); *Lewis* v. *Penna. R. R. Co.*, 100 F. Supp. 291, 294 (E. D. Pa. 1951); *Feathersmith* v. *United States*, 104 F. Supp. 226, 229-30 (E. D. Pa. 1952). Also, the charge did not state that a person has a duty to suffer pain.

II. Contention that it was erroneous to say that Dr. Wolcott agreed with the other doctors in believing there was no need for an open reduction operation (Paragraph 30 of Motion for New Trial).

A reading of Exhibit P-11[3] and consideration of the testimony on this point indicates to the trial judge that, after considering new X-rays, as well as X-rays taken at Jefferson Hospital, Dr. Wolcott did not want to perform

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[1] N. T. 62. At page 66, she said of the doctors: "They wasn't doing nothing." At page 73, she said that the doctors "didn't pay me no attention."

[2] See N. T. 497, 500-501 and 501-502, where this language was used:

"There would be no recovery for this if you believe the plaintiff was unreasonable in trying to rehabilitate her leg through using it and that she was able to work in July 1951. If she has cooperated in trying to get well but has not recovered, even though her doctors were not good doctors, that is not her fault, and then her recovery for this second item of damages would vary from $23,000 to $27,800, * * *.

* * * * * * *

"* * * you must give her something for pain and suffering, because she did have very real pain, very real suffering, very real inconvenience during this period, and it is admitted by everybody that this business of putting weight on a broken ankle is painful, it hurts to get it well. On the other hand, a person has a duty to get it well, has a duty to try to cooperate and reduce the amount of damage."

[3] See the last sentence of the first paragraph of this communication of August 22, 1951.

an open reduction operation as of 8/21/51, even though he believed the bone was not entirely healled. See N. T. 313-314.[4] Even if the trial judge was incorrect, the charge emphasized that the trial judge's memory on this point might be different from that of the jury and that the jury might remember some evidence that the judge had overlooked.[5] There is no evidence in the record that plaintiff was unable to produce Dr. Wolcott as a witness, so that any confusion in the record on this point, which was introduced into the case by plaintiff, is her responsibility. Under such circumstances the charge does not contain reversible error in this respect.

III. CONTENTION THAT IT WAS ERROR TO DRAW AN INFERENCE FROM THE FACT THAT PLAINTIFF FAILED TO CALL DR. WOLCOTT AND DR. LOCKMAN (PARAGRAPH 31 OF MOTION FOR NEW TRIAL).

On the issue of damages, one of defendant's main contentions was that plaintiff had been physically able to return to work on July 31, 1951. One of plaintiff's contentions was that Dr. Wolcott, of the Women's Medical College Hospital, had believed it was advisable to perform an open reduction operation on plaintiff in August

[4] The following testimony appears at N. T. 314:

"Q. Dr. Cherner, as a result of your department's conversation with Dr. Vastine of the Women's College Hospital, was it or was it not concluded that this woman was able to use her left ankle or foot without having any such operation?

A. It was."

[5] The language of the charge at N. T. 497-498 is as follows:

"* * * in July 1951, Dr. Wolcott felt that an open reduction operation would be desirable because the plaintiff complained of pain preventing her from working. In the letter of August 22, as a result of x-rays, and a typographical error in a previous report, he changed his position and stated that he would not perform an operation.

"Now, this is my memory of the testimony and yours may be different. Dr. Wolcott's position in wanting to do an open reduction was changed as a result of the stand taken by doctors employed by the Reading Company, but I can remember nothing in the record that indicates that his mind was not completely changed by the opinions of the doctors. However, counsel for plaintiff has argued to you that Dr. Wolcott was prevented from doing this operation by the Reading Company doctors, and you may remember some evidence on this which I have overlooked."

1951 and, hence plaintiff could not have been fit for the strenuous work of a track laborer on July 31, 1951. As pointed out above under part II of this Exhibit A, the plaintiff produced the testimony concerning Dr. Wolcott's views on such an operation from the defendant's medical records, but the testimony and Exhibit on this point do not make crystal clear what Dr. Wolcott's ultimate view concerning this operation was. Under these circumstances, Dr. Wolcott was very familiar with a relevant fact, that is the physical condition of plaintiff's left leg and ankle in the summer of 1951, and there was no showing that he was unavailable as a witness.

Another contention of defendant was that plaintiff's present condition resulted from disuse of her muscles caused by using tight bandages, crutches, a brace, etc., keeping her ankle from getting exercise. During the trial, plaintiff's counsel also brought out by having a witness testify from the medical records of the Philadelphia General Hospital that Dr. Lockman of that hospital had treated plaintiff in 1952 and recommended that she wear a brace. Hence, Dr. Lockman was familiar with plaintiff's physical condition in 1952 and there was no showing that he was unavailable as a witness.

The applicable rule of law in such cases is that where witnesses familiar with the facts are available and not produced on the stand, the jury is entitled to infer that their testimony would be unfavorable to the cause of the party whose interest it is to establish the facts with which the witnesses are familiar. See *United States* v. *Grannis,* 172 F. 2d 507 (4th Cir. 1949), cert. den. 337 U. S. 918 (1949); Wigmore on Evidence (3rd Ed.), § 285.

In view of the above facts, this language of the charge is no more favorable to the defendant than the trial judge was required to give under the above-mentioned rule of law (N. T. 498-499):

> "In this connection, you are entitled to take into consideration plaintiff's failure to produce as a wit-

ness Dr. Wolcott, to whom she referred so often during this case, and Dr. Wolcott was never here in court. Dr. Lockman was never here in court, and those were the doctors who treated this plaintiff during this early period when the Reading Company says that they gave her a return-to-work slip, that she was perfectly able to return to work, and their doctors say there was a complete union, and they say that she kept using Ace bandages and other supports which did not put the proper weight on the ankle in order to permit its recovery."

In view of the references to these doctors in the arguments of counsel (N. T. 442-444, 466-467, & 472-473), an instruction on this subject was necessary and proper.

IV. Contention that it was error to point out that Dr. Bonner never saw records of Women's Medical College Hospital (Paragraph 32 of Motion for New Trial).

Plaintiff's counsel called Dr. Bonner, who testified that he examined her on November 9, 1955, when he made the diagnosis described at page 6 of the Opinion. Also, Dr. Bonner testified that plaintiff was using a crutch and cane, during the period since her fall on 11/27/50, under doctor's orders, even though he had only seen the records of the Philadelphia General Hospital and the Temple University Hospital beginning in January 1952 and had not seen the records of the Women's Medical College Hospital (N. T. 186), where plaintiff was treated until the end of 1951 (N. T. 172 and 174-176). Furthermore, it was as of July 31, 1951, that defendant's doctors believed plaintiff had made a sufficient recovery to resume her job as a track laborer. Under these circumstances, the trial judge felt it was his duty to point out in the charge that Dr. Bonner saw none of the 1951 records when plaintiff was treated at the Women's Medical College Hospital (N. T. 499).

III. DEFENDANT'S EXHIBIT 1.

OFFICE OF SUPERVISOR
406 Spring Garden St. Sta.
Philadelphia, Pa.

January 19, 1951

Testimony of Lucille H. Burch, Section Laborer, at the hearing and investigation in the case of personal injury at Scotts Lane East Falls, on Monday, November 27, 1950, at about 8:15 A.M.

Following present:

J. A. Voelker, Supervisor.
Carl Bello, Vice Chairman.
Domenic DiLuzio, Section Foreman.
Lucille H. Burch, Section Laborer.
E. A. Frank, Claim Agent.

MR. VOELKER (questioning):

Q. Mrs. Burch, you have been called to the office to attend hearing and investigation under the rules of your agreement in connection with personal injury sustained by you at about 8:15 A.M. on Monday November 27, 1950, while working at Scotts Lane, East Falls, regarding which you are charged with responsibility. Is this understood by you?

A. Yes.

Q. You are charged with responsibility in connection with this injury. Are you ready to proceed?

A. Yes.

Q. Do you desire to be represented by counsel or have any other witnesses present?

A. Yes, Mr. Bello, who is present.

Q. What is your length of service?

A. Since, April 20, 1944.

Q. How long have you been a section laborer?

A. Since, April 20, 1944.

Q. What is your present assignment and how long have you held it?

A. Section laborer, Wissahickon, since April 14, 1950.

Q. Mrs. Burch, at 8:15 A.M., November 27, 1950, you were instructed to perform certain duties at Scotts Lane Crossing, on the Norristown Branch. Tell me just what you were doing at this time.

A. I was assigned by Section Foreman DiLuzio with section laborer Avellino to fill in crossing at Scotts Lane. We were taking dirt from the south side of the railroad and carrying it to the crossing filling in the holes on the east bound track. While returning to get another shovel of dirt I fell just outside of the east bound track on the paved portion of the street. When I fell I felt pain in my left leg. The other laborers helped me to my feet and stopped a passing motorist, who took me to Womens' Medical Hospital. At the hospital, they took X-rays and put a cast on my leg. About 1:00 P.M. they permitted me to go home.

Q. Mrs. Burch, what do you attribute the accident to your foot?

A. I fell.

Q. Mrs. Burch, what caused you to fall?

A. I don't know.

Q. Mrs. Burch, was the condition of the crossing at this point, were you fell, was it smooth or was it irregular?

A. I don't know.

Q. Mrs. Burch, about how far from the near rail and also how far from edge of paved portion of street did you fall?

A. About 2 steps, from near rail, and 2 steps from edge of paved portion of the street.

Q. Mrs. Burch, what type of shoes were you wearing.

A. I had on a pair of high shoes with a pair of galoshes over the shoes. The galoshes were closed with a zipper. Galoshes and shoes were in good condition.

Q. Mrs. Burch, did you slip or trip?

A. I don't know.

Q. Mrs. Burch, what were the weather conditions at this time?

A. Clear and cold.

Q. Mrs. Burch, was there any ice or snow on the ground?

A. No, but the ground was froze.

Q. Mrs. Burch, what was the condition of the surface of the street were you fell?

A. The street was dry and frozen. I was clear of ice and snow.

Q. Mrs. Burch, then you insist you do not know what caused you to fall?

A. Yes.

Q. Mrs. Burch, have you ever had any physical ailment at this or some prior time which might have contributed to your fall?

A. No.

Q. Mrs. Burch, will you please explain whether you leg just went out from under you, or whether it simply bent which caused you to fall.

A. I don't know how I fell but I fell on my left side with my left leg under me.

Q. Mrs. Burch, did the empty shovel which you said you were carrying in any way cause you to fall?

A. I don't think the shovel caused me to fall because I was carrying it in front of me with both hands.

Q. Mrs. Burch, do you recall whether the surface of the street were you fell was level.

A. It was on a descending grade.

Q. Mr. DiLuzio, you were repairing crossing at Scotts Lane on November 27, tell me what instructions you had given to the gang at this time?

A. My instructions to the gang were to level the flanging plank even with the top of rail on both tracks and I instructed Lucille Burch to fill in the holes in the crossing with dirt.

Q. Mr. DiLuzio, just where were the holes that you instructed Laborer Burch to fill?

A. The holes were between the rails of the eastbound track.

Q. Mr. DiLuzio, the planks had been replaced and it was voids which Laborer Burch was instructed to fill in. Is that correct?

A. Yes.

Q. Mr. DiLuzio, where were you when the accident occurred?

A. I left the gang at about 8:05 A.M. in charge of Laborer Commentucci and went to East Falls Station to call the office as we are instructed to do. I returned about 8:20 A.M. and found that Lucille Burch had been injured and had already been taken to the hospital by a passing motorist. I asked the other men the point where Mrs. Burch had injured herself. They indicated the spot where she had fallen, and marks indicated the spot where she had fallen. I measured it and found it to be 3 feet from the near rail of the eastbound track, and about 2½ feet from the edge of the paving, and on the paved portion of the street. The street is of macadam construction, it was smooth and dry, and free of loose stones and dirt.

Q. Mr. DiLuzio, what were the marks that you observed where she fell?

A. Dark marks, apparently made by her galoshes.

Q. Mr. DiLuzio, what was the weather conditions?

A. Clear and cold, the street was free of ice and snow.

Q. Mr. DiLuzio, did you question the men after your return as to the fact relating to the accident?

A. Yes, Laborers Avellino, Commentucci, and Abbonizio and Spranzone were all present when the accident happened.

Q. Mr. DiLuzio, did you inspect the shovel that Laborer Burch used and what was its condition?

A. Yes, the shovel was in good condition. I inspected the shovel shortly after the accident. It was a regular #2 square mouth track shovel.

Q. Mrs. Burch, are you acquainted with Rule 4, in the safety rules for the Guidance of Employees?

A. Yes.

Q. Mrs. Burch, will you please quote or read this rule?

A. Mrs. Burch read rule #4. "4. Employees must be on the lookout for their own safety and must not depend upon supervisors or other persons to warn them of approaching danger. At places where clear view cannot be obtained, extra precaution must be taken. In case of doubt, always pursue the safe course."

Q. Mrs. Burch, do you admit your responsibility, in having violated this rule.

A. I always work safely and our Foreman daily instucts us to work safely. I cannot say if I violated this rule or not because I do not know what caused me to fall.

Q. Mrs. Burch, were you looking where you were walking when you fell?

A. Yes.

Q. Mrs. Burch, the purpose of this investigation is to develop the cause which lead to the accident and it is your responsibility to be on the alert for your own safety. You have admitted that Section Foreman DiLuzio has instructed daily in safety practices. In this particular case if you had been more careful of your footing, in my opinion, you would have observed the conditions which contributed to your injury and if you had this accident would have been averted and you would have been spared the injury sustained. Safety methods must be practiced more today than ever before so that we can realize the goal set up for Reading Company employees. I trust that in the future you will be very careful to see that no accidents will occur to you or others working with you in the performance of duty. Is this understood by you.

A. I understand what you have said.

Q. Mrs. Burch, do I have your assurance that in the future you will work in a safe manner?

A. Yes.

Q. Have you anything further to say?

A. No.

Q. Mrs. Burch, has this hearing and investigation been conducted in a fair and impartial manner and in accordance with scheduled requirements?

A. Yes.

LUCILLE H. BURCH